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No. 83-26

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

DONALD I. LAVENTHALL,

Petitioner,

—vs.—

GENERAL DYNAMICS CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONER'S REPLY IN FURTHER SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Petitioner submits this Reply Brief in response to issues raised initially in respondent's Brief in Opposition.

I. The Cases Relied Upon By Respondent Are Inapposite

The recently decided case of *Dirks v. Securities and Exchange Commission*, 51 U.S.L.W. 5123 (July 1, 1983), relied upon by respondent, does not involve the issue presented to this Court. Like the defendant in *Chiarella v. United States*, 445 U.S. 222 (1980), Dirks was an outsider, hence free to trade on non-public information. Here, respondent was an insider in the fullest sense of that term. At a minimum, respondent owed a duty of disclosure to its shareholders. The question presented by the Petition is whether that duty of disclosure was owed to

option-holders as well, persons who owned a "security" within the meaning of the Exchange Act (*see* Pet. at 8-9) and who were as directly and foreseeably affected by respondent's conduct as were common stockholders. Neither *Dirks* nor *Chiarella* disposes of this inquiry.

Respondent also suggests that *Wilson v. Comtech Telecommunications Corp.*, 648 F.2d 88 (2d Cir. 1981), undermines the seminal case of *Shapiro v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 495 F.2d 228 (2d Cir. 1974), which held that an insider about to enter the market must disclose material nonpublic information "to the investing public". Respondent is mistaken. In *Wilson*, the Second Circuit took pains to reaffirm its prior holdings in *Shapiro* and in *SEC v. Texas Gulf Sulphur Company*, 401 F.2d 833, 848 (2d Cir. 1968) (*en banc*), *cert. denied*, 394 U.S. 976 (1969) that:

> [A]nyone in possession of material inside information must either disclose it *to the investing public*, or, if he is disabled from disclosing it . . ., or he chooses not to do so, must abstain from trading in or recommending the securities concerned while such inside information remains undisclosed. [Emphasis added.]

Wilson, *supra*, 648 F.2d at 94. *Wilson* then went on to hold that this duty was owed "to those investors trading contemporaneously with the insider." *Id.* As a result of this refinement, the Second Circuit affirmed the dismissal of Wilson's insider trading claim because Wilson's purchase came approximately one month after the defendants' sales. In the present case, however, petitioner's sale on January 4, 1979 came only days after respondent's last purchase on December 29, 1978 and only hours before the material dividend information was finally revealed. Accordingly, this case is similar to *Shapiro*, *supra*, where the District Court held on remand that the defendant was liable to those who traded during the four day period between the defendants' transactions on inside information and disclosure to the "investing public" of that informa-

tion. 1975-76 Fed. Sec. L. Rep. (CCH) ¶ 95,377 at p. 98,878 (S.D.N.Y. 1975).

II. The Proposed Legislation Cited By Respondent Underscores The Need For This Court To Grant Certiorari

Respondent suggests that Congress is about to resolve the issues presented by the Petition. *See* Resp. Brief at 8-9; A-1 (referring to Bill H.R. 559, 98th Cong., 1st Sess., 1983). Although Congress' concern underscores the impact of insider trading on the nation's securities markets (*cf.* Pet. at 6-12), the Bill falls far short of resolving the "scope of Securities Acts remedies", as claimed by respondent. It establishes enhanced penalties obtainable in an action *by the Securities and Exchange Commission* against insider traders, but the question of remedies available to defrauded option-holders like petitioner remains in limbo. Indeed, the Bill continues for judicial resolution the thorny issue of under what circumstances a trader on inside information "has violated any provision of this title"—the very question which preoccupied this Court in *Chiarella* and *Dirks* and which is the subjection of the present Petition.

CONCLUSION

The Petition for Writ of Certiorari should be granted and the Judgment below should be reversed.

Dated: New York, New York
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Respectfully submitted,

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